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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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Consent to Filing

This Amicus brief is filed pursuant to Supreme Court Rule 36.2, with the written consent of all parties. Letters to that effect have been filed with the Clerk of this Court.

Interest of the Amicus Curiae

The American Society for Personnel Administration (ASPA) is the world's largest association of personnel and human resources professionals, representing over 35,000

members in business, government, and education dedicated to the furtherance of personnel and human resource management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

As the major association of the human resources profession, ASPA is vitally concerned with the orderly development of the law regarding affirmative action and its proper role in the workplace. ASPA has long advocated that properly implemented affirmative action is one of the best means of achieving a productive and equitable workplace. Thus, ASPA believes that this case provides the proper vehicle for this Court to articulate an appropriate balance between the compatible goals of providing equal employment opportunities and promoting desegregation in the workplace.

Statement of Facts

The Respondent, Transportation Agency, Santa Clara County, a public employer covered by various equal employment opportunity and affirmative action mandates, was called upon to fill a single vacancy for a road dispatcher in its Road Operations Division.

Santa Clara County governed its personnel function in accordance with merit system rules. Those rules provided that positions such as road dispatcher would be filled after an analysis of job requirements, applicants' backgrounds and test scores produced a list of qualified, eligible applicants from which the selecting official would choose the successful candidate. The Santa Clara merit system rules did not require the selection of the individual who received the highest rating on any one of the selection steps. Nor was the selecting official required to accede to the recommendation of any of the panels involved in the rating

process. The selecting official was only required to select the successful applicant from the list of eligibles.

At the time the road dispatcher job in question was being filled, the Santa Clara County civil service system was operating under an affirmative action plan ("AAP") designed to increase the utilization (employment) of minorities, women and disabled persons in all civil service job categories and job titles in Santa Clara County. The Transportation Agency was included within the scope of the County AAP and had its own specific AAP as well. The 1979 County AAP established a long-range goal for the total County work force of equating the distribution of women, minority and disabled persons working for the County with the distribution found in the Santa Clara County area work force (J.A. 59, 121). The 1979 County AAP provided that the long range goals would be modified pursuant to the 1980 census to reflect changes in the composition of the County's workforce. Further, the 1979 County AAP provided for a review mechanism to determine if individual goals for "protected groups" would be necessary (J.A. 124). The AAP further required that hiring goals be established for individual agencies on the basis of job availability, expected turnover, and the availability of women, minorities or disabled persons possessing "the desired qualifications or potential for placement." Individual Agency goals did not have to match the County-wide goal. The AAP specifically provided that the goals were "not to be construed as quotas that must be met" (J.A. 64, 123).

The Santa Clara Transportation Agency established an affirmative action plan pursuant to the County plan and in accordance with federal guidelines promulgated for grantees by the Urban Mass Transportation Agency (J.A. 30, 39). The County and Agency AAPs recognized that the attainment of the ultimate goal for utilization of females in skilled craft jobs would entail a long-term effort (J.A. 34).

The road dispatcher job at issue in this case was a non-critical, skilled craft job requiring an ability to schedule and coordinate road construction jobs including equipment and worker assignments, an ability to handle two-way radio equipment, and an ability to keep accurate records. Applicants had to have either four years of related road dispatching experience or four years of road maintenance work with County of Santa Clara (J.A.24). In response to a vacancy notice, the County received 12 applications for the position, 9 of which met the minimum background requirements. These nine applicants were each given an oral examination by a two person review Board. Seven of the applicants received the cut-off score of 70 or higher and were placed on the eligible list. One eligible candidate scored 80 points. Petitioner received a score of 75, tied for second place on the list with another male. Diane Joyce, the only female candidate, received a score of 73 (rounded-up from 72.5) placing her immediately behind Petitioner (J.A. 26). The job announcement did not provide that applicants would be ranked on the basis of their scores. At a second oral review before another panel of three employees, Petitioner was recommended for selection. The record does not indicate that the test procedures, the questions asked, or the scoring system employed by either panel were validated as job related in accordance with either professionally accepted validation procedures or federal guidelines. Nor was there any evidence that the difference between Petitioner's score of 75 on the initial examination and Ms. Joyce's score of 73 was a significant difference rather than one within the range of error inherent in the examination and scoring procedure.

The selecting official considered the qualifications of the applicants, the guidance provided by the County and Agency affirmative action programs, and the recommendations of both the Agency's affirmative action coordinator and its Road Operations Divisions Director. Based on all

of these considerations, Diane Joyce was selected for the position of road dispatcher (J.A. 28).

Issue Presented

> May an employer promote a fully qualified female applicant to a craft position after consideration of applicants' qualifications, job requirements, agency affirmative action policies and equal employment data indicating severe underutilization of females.

Summary of Argument

In terms of its facts, the case before the Court is a simple one. The Santa Clara County Transportation Agency had to fill by promotion a single opening for a road dispatcher. Following its normal personnel practices, a list of eligible, qualified candidates was presented to the Agency Director. The Agency Director did not follow the recommendation of one of the employee panels involved in the process, but instead selected another fully qualified candidate, Diane Joyce.[1]

This unexceptional personnel process was conducted in the context of an Agency affirmative action program designed to increase the utilization of minorities, women and disabled persons in its work force. The Agency AAP followed County guidelines designed to increase employment opportunities at all levels of County employment. The plan specifically provided that outreach efforts, including hiring goals where deemed necessary, were to focus on individuals who possessed the necessary skills for the available jobs or who had the potential for acquiring the skills. Further, the plan specifically disclaimed any suggestion that

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[1] Subsequently, however, Petitioner was also promoted to the position of road dispatcher. See Agency's Brief In Opposition To Petition For a Writ of Certiorari, p. 6 fn. 4.

its goals were quotas which had to be met regardless of skill or availability. Goals would be met only if qualified persons within the protected groups were available.

Neither the County plan, the Agency plan or the facts of the case before the Court reveal any deviation from accepted practices by employers mindful of their obligation to provide equal employment opportunities. Neither the County nor the Agency established lower selection criteria for individuals who were members of "protected groups." No additional points were given to women who applied for positions in which they were statistically under-represented, even though public policy has encouraged employers to increase their utilization of women. The Agency did not keep separate lists of eligible women, minorities or disabled persons from which jobs were to be filled in some preordained, proportional sequence. Jobs were not reserved or set aside for women, minorities or disabled persons. Compare *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Local 93, Firefighters v. City of Cleveland*, 478 U.S. ___, 92 L.Ed. 2d 405 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In fact, in the case at bar, the affirmative action plan merely encouraged the selecting official to take a second look at each of the qualified applicants who came before him via the standard operating procedures of the County personnel system. The selecting official was guided by the long range goal and interim hiring goal, but was under *no* mandate to base his decision on either. Based on this review, he chose an eminently qualified female.

In contrast to the spectre raised by Petitioner and his amici of wild-eyed social engineering run amok, the facts before the Court suggest no effort by the County to engage in detailed numerical race or gender balancing. Rather, in filling a craft job for which no exceptional qualifications were required, the Transportation Agency chose a well-qualified individual with long service to both the County and the Agency. This hiring decision is before the

Supreme Court of the United States only because the individual selected, Diane Joyce, is a woman, and because the selecting official was cognizant of the disastrous track record of his Agency with respect to employment opportunities for women. The modest efforts of the Agency to begin to rectify the glaring absence of females in its skilled craft positions should be applauded, not outlawed, by this Court.

The vast disparity between the number of employees in the skilled craft category (238) and the number of women in that group (0) was more than sufficient to cause the Agency to be concerned with its obvious underutilization of women and its potential legal liability. The earliest cases sustaining claims of discriminatory personnel practices turned on numerical disparities not as significant as the disparity faced by the Santa Clara County Transportation Agency. See *Hazlewood School District v. United States*, 433 U.S. 299 (1977). However, it is not necessary to decide whether the failure to promote a woman to the job of Road Dispatcher in the present case would have led to legal liability in order to understand the obvious concern and vulnerability felt by the County and Agency.

In the face of the extraordinary absence of *any* female skilled craft employees, the action of the County was exceedingly moderate. It simply permitted the normal operation of its personnel system to designate a group of fully qualified individuals, and then selected a qualified female candidate. That this modest nod toward the concept of affirmative action has been deemed by Petitioner and his several amici as violating principles of equality and merit selection is wholly unsupportable. The action by the Transportation Agency was not the straw of affirmative action that broke the camel's back. Rather, it was the belated placement of the very first straw in a large, empty basket on the camel's back. Surely camels can support much greater weight before even beginning to sense a

burden from such modest measures in the name of affirmative action.

The discussion of the *Weber* decision offered by Petitioner and his amici is barely relevant to the facts of this case. Petitioner offers a strictly mechanistic application of the *Weber* decision, focusing on the alleged absence of some "key" elements to support its claim that the County's and Agency's AAPs fall outside of the *Weber* umbrella. This argument disregards the factual basis which led to the onerous affirmative action plan adopted jointly by the Kaiser Company and its Union. Contrast the aggressive AAP in *Weber* with the relatively leisurely commitment made by the Agency to rectify the complete absence of females in skilled craft positions. The County's reasonable effort to begin to integrate its skilled worker classifications was an example of a modest affirmative action policy wholly within the scope of permissible affirmative action as defined by this Court.

Argument

A. The Issue of the Relative Qualifications of Petitioner and Diane Joyce Has Been Misconstrued By the District Court and Petitioner.

In its findings of fact, the District Court determined that Petitioner was better qualified than Diane Joyce. (Finding of Fact No. 18.) The District Court apparently reached this finding, which contradicted that of the selecting official, by reviewing the reported scores of the applicants and the recommendation of one of the two reviewing panels. The Court of Appeals did not review this finding. Nevertheless, understanding the many uncertainties inherent in any judgement as to the relative qualifications of Petitioner and Diane Joyce is critical to understanding the operation and impact of the County's affirmative action plan.

It is a standard tenet of personnel administration that there is rarely a single, "best qualified" person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is "best qualified" are at best subjective. Indeed, the County's own system was so designed. The road dispatcher job announcement did not provide that selection would be based solely on a test score or a panel recommendation (J.A. 24). There is no evidence before the Court showing that the 2.5 point differential between Petitioner and Diane Joyce after the initial oral interview was significant by any measure.[2] Nor did Petitioner introduce evidence that the second reviewing panel, which based its recommendation for selection on the responses of the candidates to six questions, received any instructions as to how it should rate the answers of applicants or the criteria it should follow in developing its recommendation. In short, there is simply no valid, reliable basis for concluding that Petitioner was more qualified than Diane Joyce.

Rather, the District Court made its determination that Petitioner was "best qualified" because of his 2.5 point margin over Ms. Joyce on an unvalidated, oral examination and the wholly subjective, unvalidated judgment of a second panel of three employees. Petitioner and his amici mischaracterize the basis for the recommendation of Petitioner in an attempt to create the impression that the Agency's personnel system was designed to produce one uniquely qualified candidate whose rejection would subvert

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[2] See A. Anastasi, *Psychological Testing* (Third Edition, 1968) Chapter 3. "The Interpretation of Test Scores: Norms and Their Uses."

the entire selection process. Petitioner and his amici would like the Court to think that the selecting official turned to a group of second rate, discarded candidates in order to satisfy an unblinking quota system requiring the selection of a woman. In light of the true facts, such a characterization cannot command serious respect.

Petitioner insists that he was the "best qualified" candidate despite the fact that Respondent's selection procedure was designed to leave that determination within the sound discretion of the selecting official. The selection process led to a "recommendation" by a panel of three employees suggesting that Petitioner be selected. While the assumption can be made, though unsupported by specific evidence, that the panel recommending him believed Petitioner was "best qualified" in some sense closely related to the job of road dispatcher, it may have recommended him for some entirely different reason.[3] The District Court had no basis for deciding whether the factors considered by the second panel in reaching its decision to recommend Petitioner were compelling enough to raise legal doubt regarding the decision of the selecting official to disregard the recommendation. All the record shows is that the second panel thought Petitioner should be selected. It requires a major leap of faith to conclude that the absolute qualifications of the candidates were thereby established.[4]

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[3] See R. Thorndike, *Personnel Selection* (1949): "Independence as a Problem in Determining the Reliability of Ratings and Subjective Evaluations," pp. 116-118.

[4] The efficacy of placing so much reliance on the second panel interview is brought further into doubt by the general lack of reliability of the process. One expert summarized the research this way:

> The inevitable conclusion derived from a number of investigations is that interview judgments, as they are usually made in the employment situation, are not closely related to independent measures of the characteristics judgment nor to measures of success on the

And even if the subjective selection process utilized by the County and the Agency could be construed to show that Petitioner was in some way the "best candidate," this determination would only have relevance if one presumes that the concept of rank ordering is the preferred means of selecting individuals for hiring or promotion for craft jobs. Rank ordering presumes that the differences between qualified candidates on a selection list are dispositive in determining who should be selected. Once this premise is established, a mechanistic striking process may be undertaken whereby a job is offered to the candidate with the highest score until the job is filled. But such presumptions should carry no weight in this case because there has been no showing that the Agency's selection process met the rigorous technical standards required for rank ordering selection, especially for the type of job being filled in the present case. See *Uniform Guidelines on Employee Selection Procedures*, 29 CFR Part 1607 § 1607.14C(9), Q & A No. 62.

The County personnel procedures did not provide for rank ordering. Rather, having established an eligibility cut-off score after the first test, the system created a pool of fully-qualified candidates eligible for selection within the discretion of the selecting official. The system was not designed to operate with such precision that, in the absence of judgment exercised by the selecting official, it would permit the conclusion that one eligible candidate was "better qualified" than another so as to mandate that candidate's selection.

Without evidence of any meaningful differences between the job-related qualifications of the Petitioner and Diane

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job. In an over-all sense, the evidence regarding the validity of the selection interview yields a distinctly disappointing picture.

Miner, J. B., The Selection Interview, at p. 46 reprinted in Hamner, W.C. and Schmidt, F.L., *Contemporary Problems in Personnel*, pp. 44-50 (rev. ed. 1977).

Joyce, it cannot be argued persuasively that the selection of Ms. Joyce violated the basic federal law prohibiting invidious employment discrimination on the basis of sex, or that it was unlawful for the Agency to follow a modest affirmative action plan designed to redress the absolute absence of women in the Agency's skilled craft jobs. Nor should such a sparse and unpersuasive record cause this Court to issue a decision which would nullify the long, national effort to afford equal employment opportunity and encourage full utilization of all members of the workforce. *Weber, supra.*

Personnel professionals in particular would view such an outcome with alarm. Faced with the demanding requirements of producing a highly productive workforce and complying with the myriad legal requirements of equal employment and workplace standards, personnel professionals must have the flexibility to weave together all of these requirements in order to conduct a lawful and effective personnel system. It is precisely this flexibility which has enabled our society to make major progress in desegregating our national workforce and utilizing more effectively the productive capacity of all Americans, regardless of their gender or color. Petitioner's argument and that of his amici, if adopted by this Court, would turn back the clock, reducing the human resources function to a clerical exercise whereby jobs would, in fact, be filled by the numbers.

B. The Vast Underutilization of Females For Skilled Craft Positions In the Transportation Agency Justified the Implementation of an Affirmative Action Program by the County and by the Agency.

Santa Clara County generally, and the Transportation Agency in particular, was faced with a serious underutilization of women in its workforce. Within the job group in which Petitioner and Diane Joyce competed for the position of road dispatcher, the underutilization was strik-

ing. There were *238 males* in the various job titles comprising the skilled craft category, but there were *0 females* in these skilled craft jobs. The magnitude of this disparity clearly justified, at the very least, the modest affirmative action followed by the Agency to begin to redress this disparity.

Whether the gross under-representation of women among the Agency's skilled craft workers rose to a level sufficient to support a determination of Title VII liability should not, however, be the deciding issue before the Court. Rather, the decisive issue is whether a gross statistical difference in the employment of females—238 to 0—is sufficient to justify the adoption and implementation of a modest affirmative action plan containing a numerical component. The majority below analyzed the relevant precedents and properly concluded that affirmative action may be taken without a prior finding of discrimination. *Johnson v. Transportation Agency, Santa Clara County, Calif.*, 748 F.2d 1308, 1313 (9th Cir. 1984).

The decision to institute modest affirmative action measures requires much less than an adjudication of liability for past discrimination. The issue is whether a gross underrepresentation of women or minorities should lead a vigilant human resources program to consider whether it has somehow screened out qualified individuals of common race or gender. This Court has consistently endorsed voluntary, remedial action by employers faced with this problem rather than awaiting the drawn out process of adjudication. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Weber, supra.* By statute and regulation, these responses have been designated "affirmative action." In determining whether the degree of underutilization is sufficient to trigger an affirmative action effort, the analysis designed to determine a *prima facie* case of discrimination should be the approach. That analysis requires a comparison of utilization and availability consistent with appropriate labor market and job requirement considera-

tions. *Hazlewood School District, supra*; *Wygant v. Jackson Board of Education*, 476 U.S. ___, 90 L.Ed. 2d 1260 (1986) (O'Connor concurring). See 41 CFR Part 60-2. Once such an analysis is made, appropriate measures should be permitted to alleviate the disparity consistent with Title VII standards. Further, the degree and scope of affirmative action should be directed to the specific deficiencies uncovered. There is no single preferred form of affirmative action. See Policy Statement on Affirmative Action issued by U.S. Department of Justice, U.S. Department of Labor, E.E.O.C., Civil Service Commission, Commission on Civil Rights (1976), 29 CFR § 1607.17.

Such efforts may be structured to produce a broad, systemic revision of the personnel process. Only last term this Court reiterated the proposition that affirmative action programs need not be victim specific. *Wygant, supra*; *Firefighters, supra*. Indeed, such a requirement would be antithetical to the goal of a desegregated workforce. Affirmative action has always been viewed as distinct from the non-discrimination mandates of Title VII. *Contractors Association of Philadelphia v. Secretary of Labor*, 442 F.2d 159 (3rd Cir., 1971); See Comment, *The Philadelphia Plan, A Study In The Dynamics Of Executive Power*, 39 University of Chicago Law Review 723 (1972). In order to speed the process of equal opportunity, a dual system of corrective measures has been established. The necessity of redressing specific wrongs has been separated from the goal of creating more open, unbiased personnel systems. To require the extremely onerous, expensive and time consuming processes of Title VII administrative enforcement and adjudication as prerequisites for modest, voluntary affirmative action policies designed to correct gross underutilization could very well delay until the next century meaningful redress for undeniable employment inequities.

In many instances, including the County and Agency plans before the Court, affirmative action simply means the codification of professional personnel practices. Good

personnel practices promote job related standards for hiring or promotion. An employer is ill-served by having an employee who cannot adequately perform a job whether that employee is white, black, male, or female. Good personnel practices lead employers to broaden their applicant pool as much as possible so that as many qualified persons as possible will apply for vacancies. Employers, and indeed the entire economy, benefit from the opportunity to choose among competing, equally-qualified candidates. Good personnel systems track hires, promotions, transfers, and terminations in order to highlight situations in which the productive potential of employees is not being fully utilized. Certainly, the glaring lack of females in the Agency's skilled craft job category was a more than sufficient trigger for the Agency's modest affirmative action efforts. Sophisticated statistical analyses were not needed to show the County or the Agency that there was a problem. Computer driven models are not necessary to justify an affirmative action plan which encourages the selection of the first female where none of 238 workers in a skilled craft category is female.

The County and the Agency reacted to the evidence before them in an appropriate manner. With severe underutilization in many job groups, with a serious potential for liability because of this underutilization, and given the longstanding public policy favoring a fully integrated public work force, the Agency's modest affirmative action efforts were fully justified.

C. The Affirmative Action Plans Adopted By The County and the Transportation Agency Are fully Consistent With The Principles Established by This Court in *United Steelworkers vs. Weber.*

This Court has struggled with the acceptability of affirmative action plans for over a decade.[5] Mirroring our

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[5] See, e.g. *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

society's laborious efforts to come to grips with the fundamental problem of equality, the Court has been faced with the need to review various legislative, regulatory and private responses in light of constitutional and statutory requirements. As oft-stated in statutory language and in the decisions of this Court, our ultimate goal is to have a color blind (and gender blind) society. However, in the long effort to reach this point, this Court has recognized that anti-discrimination laws permit, for a limited time and on a limited basis, color (and sex) conscious policies in order to undo the lingering effects of prior exclusion. *Weber, supra.* Fully cognizant of the need to carefully monitor these policies so as to avoid the substitution of a new wrong for an older one, this Court has established a framework by which to determine the acceptability of various affirmative action steps.

However, this Court has been careful to avoid setting down rigid, mechanistic formulas for acceptable affirmative action. The one constant in the Court's decisions has been an appropriate reluctance to announce universal affirmative action requirements. To do so would impose the burden of remedying a general social problem on each individual employer. Employers in different industries have different employment problems, as do employers in different geographical locations, employers with or without unions, and so forth. There can be no single method of response to underutilization, because there is no single cause, and no single form of the problem. The very diversity of our workplaces and our workforces demands individualized responses. In *Weber*, the Court took pains to explain that the opinion did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans," (443 U.S. at 208). In the *Firefighters* case, Justice Brennan noted that the Court wasn't deciding "what limits 703 places on an employer's ability to agree to race-conscious relief in a voluntary settlement . . . or what showing the employer would be re-

quired to make concerning possible prior discrimination . . . in order to defeat a challenge by nonminority employees based on § 703." 92 L.Ed. 2d at 420, n.8.

With full cognizance of these cautions, the Court has, however, provided useful guideposts as to the characteristics of an acceptable voluntary affirmative action plan. It is clear that the legitimacy of a plan hinges in large measure on the underlying facts which led to the implementation of the plan by the employer. In *Weber*, only 5 of 273 skilled craft workers were black.[6] In view of this "conspicuous racial imbalance," a special training program was established which *required* that 50% of the trainees be black until the percentage of black skilled craft workers *equalled* the percentage of blacks in the local labor force. While selection for training was to be by seniority, blacks and whites were to be considered *separately*. The *Weber* plan was thus a stringent plan regulating the method of promotion from semiskilled to skilled positions. The plan established a goal of numerical parity and set forth a short timetable in which to achieve the goal. As Justice Blackmun observed, the Kaiser plan was temporary only because its mechanism for achieving strict racial parity was so stringent that attainment of its goal in a short period of time was guaranteed. 443 U.S. at 193, 216 (Blackmun concurring).

By contrast, in the instant case no automatic, mechanically-applied preferences were provided for any of the groups specified in the affirmative action plan. Nor was the plan any more permanent than the plan in *Weber*, though the Agency's more relaxed, thoughtful approach to attainment of its goal would necessarily mean that a longer period of time would pass before the goal is achieved.

In *Firefighter's*, the affirmative action plan also included a numerically based promotion formula whereby 50% of

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[6] In the instant case, none of the 238 skilled craft workers were women.

the promotions in the Cleveland Fire Department would be awarded immediately to minorities, with a decreasing number in the subsequent three years of the decree. Contrasting this formula with the exceedingly modest provisions of the plans adopted by the County and the Agency helps demonstrate the substantial deference which ought to be shown for the voluntary plan before the Court.

Thus, the guideposts enunciated by *Weber* and followed by the Circuits since *Weber* (see *Devereaux v. Geary*, 765 F.2d 268 (1st Cir. 1985) and cases cited therein) make plain that the Santa Clara plans fall well within permissible limits. Specific time frames as found in the *Firefighters* decree were not specifically set forth in the Agency's plan simply because the plan did not demand immediate attainment of its ultimate goal. The absence of such specifications also must be balanced by the fact that the Agency plan was much less intrusive into the normal operation of the County's personnel system and the ordinary rights and duties of employees within that system. Without terms which amounted to fixed quotas, such as in *Weber* and *Firefighters*, the County would naturally take longer to reach its ultimate goal and would be unable to predict when the goal might be achieved. Thus, in view of the type of plan adopted, setting forth a particular end date was not necessary as an indicator of the permissible nature of the plan.

The fact that *Weber* and *Firefighters* involved racial discrimination rather than sex discrimination as in the present case is of no legal import. Whether or not Congress focused as readily on the pernicious impact of sexual exclusion as it did on racial exclusion when it first passed Title VII is not an important issue. By establishing a legal framework for eradicating employment discrimination and including sex within the prohibited categories, the Congress intended that both forms of discrimination be prohibited and that the vestiges of prior exclusionary policies be eliminated. Separate standards do not apply to claims

of race and sex discrimination under Title VII, nor can separate standards apply when developing affirmative action policies to deal with the problem of serious underutilization.

Further, this Court's review should be no different because the instant case arises under § 703 rather than under § 706 as did *Firefighters* last term. The analysis of the court in *Firefighters*, *supra*, has equal weight with respect to a wholly voluntary affirmative action plan as it would in reviewing a plan endorsed or imposed by a court. As has often been repeated, without voluntary compliance the remedial purposes of Title VII will remain an elusive goal of national policy. *Gardner-Denver*, *supra*; *Weber*, *supra*; *Firefighters*, *supra*. Cumbersome procedural standards requiring that the Courts approve each voluntary plan would create an unimaginable nightmare of litigation. Employers would be well advised to do nothing rather than incur the tremendous costs and uncertainty of submitting their plans for judicial review.[7] Indeed, the very goal of non-intrusion into the management of human resources which so concerned the Congress when it adopted Title VII would be eviscerated. *Firefighters*, *supra*, at 422.

CONCLUSION

Consistent with public policy, statutory requirements and judicial precedent, the personnel profession has adapted its own practices to the great societal goal of equality in employment and helped fashion the process known as af-

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[7] It should be noted that for firms which employ the vast majority of employees, private or public, there is already a mechanism by which their affirmative action plans are subject to review. Executive Order 11246, as amended, covering federal contractors and subcontractors, federal grant programs which include affirmative action requirements, and various State regulations all set forth guidelines as to the appropriate scope and permissible limits of affirmative action. The concern that by permitting voluntary affirmative action employers would be free to engage in invidious practices has no basis.

firmative action. Notwithstanding inevitable abuses and false steps, affirmative action has enabled our society to achieve significant progress in the full utilization of its diverse workforce. The case before the Court presents a moderate and reasoned response by an employer to a serious problem of sex segregation. Were the Agency's response deemed to be improper, employers and their human resource managers would be precluded from resolving their own employment problems on reasonable terms. This result would be highly regressive. This Court must therefore announce unambiguously that reasoned, moderate efforts toward equality in the workplace should continue.

For all of the foregoing reasons, Amicus American Society for Personnel Administration respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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